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Supreme Court of the United States

October Term, 1957

No. 892

GUNNLEIK BERGE,

Petitioner,

AGAINST

NATIONAL BULK CARRIERS, INC. and TODD SHIPYARDS CORPORATION,

Respondents.

Brief of Respondent, National Bulk Carriers, Inc., in Opposition to the Petition of Gunnleik Berge for a Writ of Certiorari

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Supreme Court of the United States

OCTOBER TERM, 1957

No. 392

GUSTAVUS ESSER,

Petitioner,

AGAINST

NATIONAL BULK CARRIERS, INC. and TODD SHIPYARDS CORPORATION,

Respondents.

Brief of Respondent, National Bulk Carriers, Inc.

Opinions Below

The opinion of the United States District Court for the Southern District of New York is officially reported in 148 F. Supp. 406. The opinion of the Court of Appeals for the Second Circuit, affirming the District Court, is reported at 251 F. 2d 717.

Jurisdiction

It is not disputed that there is jurisdiction under Title 28 U. S. C., Section 1254 (1). However, the petition fails to specify any important reasons why in this case, under the existing facts, a writ should be granted here, nor does it indicate that any genuine ground for the granting of a writ as set forth in Rule 19 of the Revised Rules of this Court exists in this case.

Counterstatement of the Case

It is necessary to point out at the outset that the questions as framed by the petitioner and the facts related by him do not contain the matter which is material to a determination as to whether or not this case is properly the subject for the granting of a writ. Therefore, the petitioner's statements and arguments do not furnish a reliable guide to the proceedings below. In the petition, an attempt is made to make it appear that the facts of this case are not substantially different than those in the cases referred to in the petition, and that, therefore, the holdings of the courts below are in conflict therewith. There, however, is a clear line of demarcation between the subject case and those cases, and the result arrived at in the subject case is in perfect conformity with the statement of this Court in *Desper* v. *Starved Rock Ferry Co.*, 342 U. S. 187, 190, that the question of when seamen's rights should be enforced "depends largely on the facts of the particular case and the activity in which they were engaged at the time of injury."

Firstly, under the undisputed facts, at the time of the petitioner's accident, the *SS Bulklube* could not be subject to the warranty of seaworthiness. On June 22, 1952, after the crew had been paid off and the vessel stripped of its gear and equipment, it was delivered into the custody of respondent Todd Shipyards Corporation for the purpose of being reconstructed and rebuilt by Todd Shipyards in accordance with standards laid down by the United States Coast Guard and the American Bureau of Shipping. The work to be done was pursuant to a written contract which required Todd Shipyards to provide all the necessary labor and material which was needed for the completion of the work. Among other things, this reconstruction job required the removal of the vessel's decks, the burning

out of the partitions and bulkheads which divided the vessel into 23 tank compartments, the fabricating of new bulkheads and partitions, renewing the longitudinal and deck beams, reconditioning the engines, boilers, steering gear and all other machinery. As stated in Judge Murphy's opinion, the work amounted "to a virtual rebuilding of the interior of the vessel." The petitioner's accident occurred during this rebuilding as he and several other employees of Todd Shipyards Corporation were below deck installing a new tank bulkhead in a place where one had formerly been and which had been previously removed by shipyard workers. The *SS Bulklube* remained in the shipyard's custody during this entire rebuilding period and was not redelivered to the owner until December 18, 1952. Thus, what the petitioner was working on at the time had no connection with commerce or navigation and, for that matter, might never again engage in commerce or navigation. It necessarily had been withdrawn from navigation for a long period.

Secondly, the work which petitioner was engaged in at the time of the occurrence of his accident was not work traditionally and historically performed by members of the crew of a vessel but was of a nature which could be performed only exclusively by shore based personnel.

Petitioner's duties as a rigger in the employ of Todd Shipyards Corporation required him to work on any vessel which was in his employer's yard. On the date of his accident he was called upon to help adjust a steel bulkhead, which was about 20 feet high, 40 feet long and about 1 inch thick, by means of a manually operated chain hoist so that it would set against the framework where it could be permanently welded into place. This bulkhead had been previously fabricated ashore at Todd's shop and had required the use of Todd's shore crane to place it on board the vessel. Prior to being welded into position, it had been

transferred from the shore crane by Todd's employees onto three chain hoists which Todd had selected from its own supply for this purpose and had suspended from padeyes which Todd's welders had temporarily welded onto the underside of the deck above the place where the bulkhead was to be located. These padeyes were removed by Todd's employees from the underdeck when the bulkheads were welded into position and before the vessel was returned to its owner.

It was while the petitioner and a co-worker were pulling on one of the three chain hoists which Todd had furnished for the purpose of temporarily suspending the 20 x 40 foot steel bulkhead, that the pin in a shackle with which the chain hoist on which the petitioner was pulling was attached to the padeye broke and caused the accident to occur. Petitioner was thus doing work which could be done only by shore based personnel on a deactivated vessel.

Finally, the warranty of seaworthiness sought to be imposed here is not that arising from the condition of the vessel, its equipment or appliances or equipment which is required for the performance of the ship's work, but instead from equipment owned by a shipyard, furnished by a shipyard and required exclusively for the performance of shipyard work.

There is no dispute that the chain hoist, the shackle and the pin which broke and the padeye which was temporarily welded to the underdeck were all owned by Todd Shipyards, and were selected and furnished by Todd Shipyards exclusively for shipyard work. They never became part of the vessel and had to be removed before the ship's work could be performed. The ship had no need for it and, for that matter, in all probability never knew it existed. There is no basis in reason or logic for extending seaworthiness to comprehend appliances which a ship does not need and

which could not be on board except if the vessel is not engaged in ship's business.

Initially, the petitioner sued both National Bulk Carriers, Inc., the owner of the vessel, and Todd Shipyards Corporation, his employer. On the trial, petitioner discontinued the action against his employer because his remedy against Todd Shipyards was under the Longshoremen's and Harbor Workers' Compensation Act. Todd, however, remained in the action on the basis of a cross-complaint which National Bulk Carriers, Inc. had filed against it, seeking full indemnity. The suit thereafter proceeded against National Bulk solely on the ground of whether the shipowner's warranty of seaworthiness was to be extended to shipyard employees engaged exclusively in shipyard work.

On the trial, by agreement, the only question submitted to the jury was the quantum of damages. All other issues, both fact and law, were left for determination by the trial court. In accordance therewith the District Court found that under the circumstances of this case, no legal or factual basis existed for the application of the warranty of seaworthiness to the petitioner.

By applying the standards suggested by this Court in *Seas Shipping Co. v. Sieracki*, 328 U. S. 85, and *Pope & Talbot, Inc. v. Hawn*, 346 U. S. 406, the District Court found that the nature of petitioner's employment clearly distinguished his case from those in which the warranty of seaworthiness had been applied to non-members of a ship's crew. It emphasized the fact that it found that petitioner was engaged in rebuilding a vessel and not in such repair work as members of the crew have historically been required to perform both at sea and in port. Since the work of rebuilding a ship was not traditionally seaman's work, the premise on which the whole rationale of

the *Sieracki* case, *supra*, rested precluded the application of the warranty of seaworthiness to this case. This Court in laying down the doctrine of the *Sieracki* case made it clear that the warranty was designed to extend only to those services which a ship's crew traditionally performed and which [illegible] ought to have done with the advantages of more modern divisions of labor and none other.

In affirming, the Court of Appeals pointed out that on the facts the District Court had found that the petitioner had failed to prove his claim. Accordingly, it affirmed and held that because the reconstruction work in which petitioner was engaged was not traditionally the task of the crew, he could not invoke the warranty of seaworthiness.

In *Halecki* v. *United New York & New Jersey Sandy Hook Pilots Association*, 251 F. 2d 706, which was handed down simultaneously with the decision in this case, the majority emphasized the clear line of demarcation which existed between this case and the *Halecki* case, *supra*. In distinguishing the *Halecki* case from this case, it said at page 712:

> "* * *, the work did not involve any structural changes in the ship, but was of a kind that was part of the crew's work, not only at sea, but when she was laid up for general overhaul."

The dissenting opinion of Judge Lumbard went even further. Judge Lumbard expressed the opinion that the holding of the majority in the *Halecki* case, *supra*, was based on a play on words and that there was no more reason for extending the warranty to Halecki than there was to the petitioner if the reasoning of the majority were carried to its illogical extreme. Judge Lumbard's expression of

dissatisfaction with the test to be applied is not directed to that laid down by this Court in *Seas Shipping Co. v. Sieracki*, 328 U. S. 85, and *Pope & Talbot, Inc. v. Hawn*, 346 U. S. 406, but to the manner in which this test was misapplied by the majority in the *Halecki* case, *supra*.

The decision of the court below in this case is, therefore, not inconsistent with the standards laid down by this Court in the *Sieracki* and *Hawn* cases, but perfectly in harmony therewith. The inconsistency which may exist between the *Halecki* case and this Court's holdings is not a valid basis for the granting of a writ in this case.

Questions Presented

Under all the material facts of the case, the actual questions are as follows:

(1) Whether an employee of a shipyard working on board a deactivated vessel, which is in the custody and control of the employee's shipyard employer for the purpose of being rebuilt, can invoke the warranty of seaworthiness against the owner of the deactivated vessel for injuries brought about by the breaking of gear belonging to the shipyard, which is brought aboard by the shipyard for the sole purpose of carrying out the rebuilding work, and which is removed from the vessel on the completion of the work.

(2) Whether the work of rebuilding a vessel, which involves structural repairs, is work that was historically and traditionally done by members of the crew of a vessel.

(3) Whether a vessel which is in the custody of a shipyard and is undergoing repairs which virtually amount to a rebuilding of the interior of the vessel is subject to the warranty of seaworthiness.

Argument

(1) Petitioner's contention that the warranty of seaworthiness applies to him while he is engaged in rebuilding a vessel, which because of the nature of the work to be performed must, of necessity, be delivered into the custody of the shipyard employer and be withdrawn from navigation, is clearly unsound and contrary to the long-established principles of applicable law. Petitioner's allusions to the work being done on board as repair work are contrary to the undisputed facts and could be misleading. While it may be true that the concept of control does not, in all instances, affect the nature of the shipowner's obligation, *Petterson* v. *Alaska S.S. Co.*, 347 U. S. 396; *Berryhill* v. *Pacific Far East Line*, 238 F. 2d 385, cert. denied 354 U. S. 938, it nonetheless serves to emphasize the line of demarcation which exists between traditional ship's work and non-ship's work and places this case beyond the class of cases to which this Court has held that the shipowner's obligations under the maritime law apply.

In *Desper* v. *Starved Rock Ferry Co.*, 342 U. S. 187, this Court has reiterated the principle that even a seaman who is engaged in work on a vessel out of navigation, which work customarily would be exclusively done by shore based personnel, cannot recover against his shipowner employer under the Jones Act (46 U. S. C. A. 688, *et seq.*). In arriving at the conclusion that seaman's rights could not be involved, it gave particular emphasis to the status of the vessel at the time in question. In this connection, it said at page 191:

> "* * *. The distinct nature of the work is emphasized by the fact that there was no vessel engaged in navigation at the time of the decedent's death."

While it is true that at the time of the death of the decedent in the *Desper* case, *supra*, the vessels on which he was working were not afloat, this is not a material factor when a vessel is out of navigation. See *Hawn* v. *America S.S. Co.*, 107 F. 2d 999, 1000 (2 Cir.); *Seneca Washed Gravel Corp.* v. *McManigal*, 65 F. 2d 779, 780 (2 Cir.), and *Antus* v. *Interocean S.S. Co.*, 108 F. 2d 185, 187 (6 Cir.), cited with approval by this Court in the *Desper* case, *supra*. Thus, since under the established law, no right to recover damages against the shipowner employer would exist in favor of a seaman working on a vessel out of navigation, it would not be consistent to give a right to the petitioner which a seaman could not invoke under similar circumstances.

(2) Petitioner's contention that a writ should be granted because of the importance of the shipping industry in this country and because it involves many people and, therefore, it is in the public interest that the rights and liabilities of persons engaged in activities with the shipping business should be fixed and determined is misleading and misdirected. It would seem that it would be more in the public interest to place the liabilities where the actual fault lies and that this Court should not be resorted to in an attempt to circumvent a legislative policy and give a right of recovery where the legislature has already acted. Petitioner's contentions are fully answered by the Court of Appeals (9 Cir.) in *Berryhill* v. *Pacific Far East Line*, 238 F. 2d 385, cert. denied 349 U. S. 938. It was there said at pages 387-388:

> "The appellant has his statutory remedy against his employer. Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. Sec. 901 et seq. He has his common law remedy as a business invitee against the shipowner, if he can

prove the latter's negligence. In view of such rights and protection, he does not need, nor should he ask, for the further extension of a doctrine already stretched. If there exists a social need for such an extension (which we doubt in view of existing remedies), it is a matter for Congressional enactment, and not for this Court to bring about, thru judicial legislation.' Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U. S. 282, 286, 72 S. Ct. 277, 96 L. Ed. 318."

The petitioner here also has a remedy under the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. A. 901 *et seq.*). His rights and liabilities have already been fixed and determined by the legislature. A writ should, therefore, not be granted for the purpose of having this Court pass on whether the legislative policy was wise or not, nor should this Court be asked to circumvent the legislative will and create a theory of liability which would allow the petitioner to by-pass the rights which the legislature deemed fit to fix. *De Zon v. American President Lines* (1943), 318 U. S. 660, 672.

If the rights which the legislature fixed are inadequate, the proper recourse is Congressional action and not resort to this Court. *Lauritzen v. Larsen* (1953), 345 U. S. 571, 593.

(3) Petitioner's contention that the decision below narrows and constricts applicable decisions of this Court, that it is probably in conflict with them, and that it conflicts with decisions of the Courts of Appeals of other circuits and with the District Court decisions, as well as its own earlier decision, is equally untenable.

The decision below is squarely within the holdings by this Honorable Court in *Seas Shipping Co. v. Sieracki*,

supra, and *Pope & Talbot, Inc.* v. *Hawn*, *supra*. When petitioner urges that the court below cited no case in this Honorable Court squarely deciding the issue raised, he overlooks the clear mandate of this Court that the warranty of seaworthiness was not intended to extend beyond work traditionally done by the ship's crew. There is no need for the granting of a writ in this case. The uniformity which the petitioner urges here can be achieved by a denial of the writ and not by the granting of it.

Furthermore, there is no actual conflict between the decision below and decisions in other circuits and district courts where the issue as to whether the warranty of seaworthiness should apply or not was raised and considered.

The case of *Ross* v. *SS Zeeland*, 240 F. 2d 820, presents no conflict as it concerns a port watchman who was performing watching services on board a vessel at the time it was unloading cargo. The issue of whether the warranty of seaworthiness applied to him or not does not appear to have been raised, but whether it was or not, seamen have, from time immemorial, stood watch on board while a vessel is in port discharging and the warranty would have to be applied because he was doing seamen's work.

Imperial Oil Ltd. v. *Drlik*, 6 Cir. (1956), 234 F. 2d 4, cert. denied 352 U. S. 941 creates no conflict either. The claimant there was injured while acting as a member of a dock crew and was engaged in the undocking of a vessel. In the words of the Appellate Court, he was "doing a seaman's work and incurring a seaman's hazards." There is no dictum in this case, as petitioner asserts, which states that the warranty applies to an employee of a shipbuilding company engaged in repairs and related work. In fact, if it did, it would be contrary to this Court's holding in *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406, 413, where it was emphatically stated that the protection was not based

on the name used to describe the job the injured held, but on the type of work being done and its relationship to the ship and to the historic doctrine of seaworthiness.

Caudill v. *Victory Carriers*, 149 F. Supp. 11, also creates no inconsistency. In that case, an Army corporal who was engaged in the duties of a longshoreman was permitted to invoke the warranty of seaworthiness on the ground that he was entitled to the protection accorded those doing traditionally seaman's work in accordance with the holding of this Court in the *Sieracki* case, *supra*.

The cases of *Read* v. *U. S.*, 201 F. 2d 756 (3 Cir.), and *Lester* v. *U. S.*, 127 F. Supp. 413, 234 F. 2d 625, cert. granted 352 U. S. 869, and dismissed per stipulation pursuant to Rule 60 of the Rules of this Court, 353 U. S. 963, furnish no valid precedents of a conflict with the decision below. As the District Court pointed out in its opinion, 146 F. Supp. 606, the issue of whether the warranty of seaworthiness applied or not was never raised in the *Lester* case, *supra*, and the Appellate Court never discussed it. This is what also appears to have occurred in the *Read* case, *supra*. This Court has unequivocally rejected such cases as precedents for anything. In *Webster* v. *Fall*, 266 U. S. 507, it said at page 511:

> "* * * We do not stop to inquire whether all or any of them can be differentiated from the case now under consideration, since in none of them was the point here at issue suggested or decided. The most that can be said is that the point was in the cases if anyone had seen fit to raise it. Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents. * * *"

The purported conflict between *Meyers* v. *Pittsburg S.S. Co.*, 165 F. 2d 642 (6 Cir.), and the decision below is no conflict at all. They are in fact in perfect harmony. In the *Meyers* case, *supra*, the court stated that it would refuse to apply the warranty of seaworthiness, even if there was evidence supporting it, to a shipyard worker who was injured on a drydock in connection with certain reconditioning and repair work which was being done on board a vessel. Thus, the purported conflict in decisions does not exist.

On the other hand, there is complete unanimity between the decision below and the decisions of this Court as well as those of other courts where the issue of whether or not the warranty of seaworthiness should apply to shipyard workers doing exclusively shipyard work has been raised and considered. See *Berryhill* v. *Pacific Far East Line*, 9 Cir., 238 F. 2d 385, cert. denied 349 U. S. 938, and *Raidy* v. *United States*, 4 Cir. (1958), 252 F. 2d 117.

CONCLUSION

The decision of the Court below is correct. The petition fails to present any important reason for granting the writ. No substantial question is raised. There is no conflict of decisions. Petitioner's remedy, if any, is legislative and not properly directed to this Court.

The petitioner's complaint was properly dismissed and it is respectfully submitted that this Court should deny the petition.

Respectfully submitted,

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